

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

FINAL ORDER MO-3134-F

Appeal MA14-287

Halton Catholic District School Board

December 5, 2014

Summary: This is a final order following Interim Order MO-3104-I. The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information pertaining to his son. The Halton Catholic District School Board issued an initial decision setting out a fee estimate and time extension decision, which was appealed to this office. In Interim Order MO-3104-I, the adjudicator did not uphold the time extension decision, finding that it was premature. This final order addresses the fee estimate, which the adjudicator upholds.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, 20 c. M.56, as amended, sections 45(1), 45(4); Regulation 823, section 6.1.

Orders Considered: Orders MO-2530 and MO-3104-I.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Halton Catholic District School Board (the board or Board) for access to the following information pertaining to his son. He sought access to:

From Sept. 2009 to Present –
Copies of all OSR and non OSR Records, including all staff notes, meeting notes, observation notes, assessment notes, rubrics, checklists, SLP +

psych assmt notes/documents, special ed consultant notes, incident/investigation notes, all email and electronic communication (school, board, external), referral records, SERT files/notes/docs, consultation files, phone notes, microfilm

[2] The appellant's request was accompanied by a cover letter, in which the appellant wrote:

I respectfully ask that you contact me directly if there are any questions you may have regarding the [request], to ensure there is no unnecessary delay in processing my request. I look forward to a seamless process for the delivery of the information required.

[3] The board issued its initial decision, which provided as follows:

In order to ensure that all potential records have been identified we have determined that 32 individuals may have records in their possession that would be part of the request. Of those 32 individuals, 17 individuals have indicated that they have records that may pertain to the request.

From those 17 individuals we have determined that there are 3164 records that pertain to this request.

Under section 6 of Regulation 823 made under the *Act*, the following fees apply:

- Photocopies of approximately 3164 pages at a cost of \$0.20 per page = \$632.80.

[4] The letter set out that in accordance with section 7(1) of Regulation 823, where the fee estimate exceeds \$100.00 or more, the head may require a deposit equal to 50 per cent of the estimated fee before taking any further steps to respond to the request. The board requested a deposit in the amount of \$314.40 in order to process the request.

[5] The board's letter further advised:

We will not know until we process the records, but your request raises the potential for the application of the exemption in section 11(h) Questions used in an examination or test for educational purposes, section 12 Solicitor Client privilege and other sections under the *Act* not yet identified.

[6] Finally, the board requested a time extension under section 20(1)(a) of the *Act*, as follows:

In addition, we will require an extension to November 1, 2014 to answer your request for the following reasons:

- The volume of records that need to be reviewed as per the request
- Most of the staff identified in the request are not scheduled to work during July and August

[7] The appellant appealed the board's decision by filing an appeal with this office.

[8] At mediation, the appellant advised that he would be amenable to receiving the records on a CD-ROM in accordance with section 6.1 of Regulation 823, instead of photocopies.

[9] With respect to the time extension, the appellant contended that the board should have contacted him at the outset when it received his request, if it considered his request to be broad and involving many records, instead of seeking a time extension. The appellant also advised that with respect to the time period covered by the request, he is seeking records that date back to the first day his son attended school (rather than the earlier date of September 9, 2009 noted in his request). In addition, the appellant indicated that he would be amenable to a time extension to September 2, 2014 with the board adopting a staged approach of every 2 weeks, based on the following order of priority for the records:

1. Non OSR records (staff notes, meeting notes, observation notes, rubrics, checklists, SERT files)
2. OSR records, special ed consultant records, SP records, Psych asmt records, incident investigation notes, board staff consultation files
3. All electronic records, emails from school staff, board staff, external, referral records, phone notes, microfilm, other records not included above

[10] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[11] I addressed the request for a time extension first which was the subject of Interim Order MO-3104-I. In that order, I found the board's request for a time

extension to be premature, leaving the board's fee estimate to be addressed in this final order.

[12] Accordingly, I sent a Notice of Inquiry to the board setting out the facts and issues regarding the board's fee estimate. The board provided representations in response to the notice. I then sent a Notice of Inquiry to the appellant, along with a copy of the board's representations. The appellant provided responding representations.

DISCUSSION:

General principles

[13] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

[14] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate [Section 45(3)].

[15] Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.¹

[16] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.²

[17] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.³

[18] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁴

[19] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

¹ Order MO-1699.

² Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

³ Order MO-1520-I.

⁴ Orders P-81 and MO-1614.

[20] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[21] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Section 6.1, 7 and 9 read:

6.1. The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For records provided on CD-ROMs, \$10 for each CD-ROM.
- 3. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
- 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the

person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[22] The *Act* and Regulation 823 also contains fee waiver provisions. Section 45(4) of the *Act* reads:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed by the regulations.

[23] The board submits that its fee estimate was guided by section 45(1) of the *Act*, and explains that since it treated the request as being one for personal information, it only provided a fee estimate for the photocopying of the records that may be responsive to the request.

[24] The board submits:

Our fee estimate has been guided by subsection 45 (1) of the *Act*.

In order to determine the fee estimate we contacted the Principal who identified 32 individuals that may have records that pertain to the request. Our Freedom of information Officer contacted all 32 of those individuals and requested that they review their records and provide the School Board with a response on whether or not they had any records that pertain to the request. Out of those 32 individuals that responded 17

indicated that they had records that pertain to the request. As a result of this the School Board requested them to count the number of records (in pages) that pertain to the request. Those 17 individuals did respond and did provide the Board with the totals. It is from this information that the School Board has determined that there are 3164 records pertaining to this request.

In discussions with the 17 individuals that have records pertaining to this request, the majority of the records are only readily available in paper format. In order to provide the Requestor with copies of the records, these records must be photocopied. The Board will review the records and where necessary sever the records. The redacted records would then be photocopied and provided to the Requestor. The School Board has only factored into the fee estimate the final photocopying of the records which would be released to the Requestor.

Based on the nature of the request, the School Board anticipates that most of the records will be released at least in part to the Requestor. In order to be thorough and transparent in our response to the Requestor we also indicated that some records may not be released as a result of section 11 (h) Questions used in an examination or test for educational and section 12 Solicitor-Client privilege and any other sections under the Act not yet identified. However a final fee for the photocopying can only be provided once we have had an opportunity to review the records and applied any exemptions deemed appropriate as per the *Act*. We will refund any amount paid under subsection (1) based on our final count, if required.

Although the mediator indicated that providing the records on a CD-ROM was an option, the School Board does have some concerns regarding the additional length of time that would be required to assimilate all the information that pertains to this request onto a CD-ROM. The Board would still have to photocopy the material, sever it where appropriate and then scan it to a CD-ROM. This additional step was not factored in to our initial request for the time extension.

[25] The appellant's representations take issue with the manner in which the board processed his request. He also takes the position that the board should have taken additional steps to clarify the request and assist him in attempting to narrow the request in order to reduce the estimated fee. The appellant submits that in all cases "the institution must include a detailed breakdown of the fee and a detailed statement as to how the fee was calculated." He submits that the board's fee estimate was deficient, asserting that:

The only criteria met by the board interim access decision letter dated June 20, 2014, was the inclusion of one bullet point that identified approximate pages and a cost. I was therefore unable to determine if any of these records are duplicates, copies of what I may have in my possession, or in different formats (print and electronic).

[26] The appellant points to the letter he sent to the board where he wrote:

I respectfully ask that you contact me directly if there are any questions you may have regarding the [request], to ensure there is no unnecessary delay in processing my request. I look forward to a seamless process for the delivery of the information required.

[27] The appellant further submits that "the board has failed to take initial steps to clarify what records were being requested and could have greatly narrowed the scope initially." He states that he "was never contacted by any representative of the board then or to date."

[28] He submits that:

... During the mediation stage, I also clarified that the dates for records can be revised to the first day my sons attended school. This would be very limited for my elder son as he attended only 2 days of school per week while doing [specified] therapy, and my younger son did not begin staggered SK until [specified date]. This in my view additionally reduces the scope for search time and records.

[29] In support of his position that the board's decision letter was deficient he sets out what elements he believes were missing and refers to Orders MO-1980, MO-2358, MO-2530, P-81, PO-2424, PO-3220 and a paper from this Office entitled "Fees, Fee Estimates and Fee Waivers", Commissioner Ann Cavoukian Ph.D, October 2003.

[30] With respect to providing the records on a CD-ROM the appellant submits that "[i]t is reasonable to provide electronic copies of paper format records using scanning technology and then onto a CD-ROM as I suggested during the mediation stage."

[31] The appellant concludes his submissions with a number of points, as follows:

The manner in which the board responded to his request was poorly handled.

The institution did not work constructively with him to narrow/clarify the request.

The board did not suggest or offer providing any records free of charge.

He attempted to work constructively and diligently to narrow the scope of the request and made suggestions for how the information can be provided to reduce cost and a staggered timed approach for providing records.

He questioned the volume of records as the board "failed to identify and provide a detailed estimate of what the number of records are comprised of. Further, a check of my e-mail reveals several hundred email communications (for both sons) between the school/board and parent which would amount to a significant amount of electronic pages, but the board contends the majority are printed documents."

He advanced "several compromise solutions during mediation which would reduce proposed fees (CD instead of print, clarify duplicate records which may even be microfilm, and narrowing the date scope)."

He contended that "since the board has not promoted a sense of collaboration and willingness to work with the requestor and continue to find avenues to delay release of documents, waiving of any potential fee would not be considered shifting of an unreasonable burden of cost." He advised that he was willing "to cover the cost of any CD-ROM's (\$10) or send them in to the board."

Analysis and findings

[32] The last points of the appellant's representations are the types of submissions that are properly made in support of a fee waiver request under section 45(4) of the *Act*. The appellant has not formally requested a fee waiver. A requester must first ask an institution for a fee waiver, and provide detailed information to support the request before this office will consider whether a fee waiver should be granted. In the absence of such a request, I will address the fee waiver issue and the submissions that relate to a fee waiver request no further in this appeal.

[33] In my view, the board has provided a fee estimate that complies with the provisions of the *Act*. It properly considered the request to be for personal information and only claimed the cost of photocopying. In my view, it has sufficiently explained in its decision letter and its representations, a copy of which was provided to the appellant, the reasons for the number of photocopies. While the appellant did narrow the scope of the request, it is still quite broad in scope. Furthermore, the appellant submits that certain email communications are in electronic format, but does not provide what number of pages those might be in the context of a request that generated 3164 responsive records. It must also be pointed out a fee estimate is simply the estimated cost for processing the request. Once the fee is paid the request is then processed. Perhaps at that stage, the board could generate an index of records for the

appellant's review, thereby allowing him to determine which of the responsive records he requires. This may, or may not, reduce any photocopying fee.

[34] Turning to the photocopying fee generally, it appears that the appellant is taking issue with the board's position that records must be photocopied before being scanned to a CD-ROM. As set out above, the board explains that certain records must be photocopied before scanning:

In discussions with the 17 individuals that have records pertaining to this request, the majority of the records are only readily available in paper format. In order to provide the Requestor with copies of the records, these records must be photocopied. The Board will review the records and where necessary sever the records. The redacted records would then be photocopied and provided to the Requestor. The School Board has only factored into the fee estimate the final photocopying of the records which would be released to the Requestor.

...

Although the mediator indicated that providing the records on a CD-ROM was an option, the School Board does have some concerns regarding the additional length of time that would be required to assimilate all the information that pertains to this request onto a CD-ROM. The Board would still have to photocopy the material, sever it where appropriate and then scan it to a CD-ROM. This additional step was not factored in to our initial request for the time extension.

[35] Other orders of this office have addressed a submission that photocopying is required before scanning to a CD-ROM.⁵ There is no evidence before me that all the records are stored electronically. There are a large volume of responsive records. In Order MO-2530, Adjudicator Laurel Cropley wrote:

Section 6.2 of Regulation 823 indicates that the cost for providing records on CD-ROM is \$10 for each CD-ROM. I interpret this section as referring to making CDs of machine readable records. The regulation does not specifically refer to scanning paper records in order to provide the information on CD. In my view, this activity is a necessary component of producing the paper records in the format requested by the appellant [see Order PO-2424 for a discussion of producing a record in a version other than as a paper record]. As I noted above, section 6.4 of the regulation provides that an institution may charge \$7.50 for each 15 minutes spent by any person "for preparing a record for disclosure." The Town has

⁵MO-2530, MO-2577, MO-2595 and MO-2908.

applied this fee structure in estimating the costs associated with producing the information on CDs. I am satisfied generally in the approach taken by the Town.

[36] Although a fee for preparing a record for disclosure is not at issue in this appeal, I find Adjudicator Cropley's reasoning equally applicable with respect to a fee for photocopying under section 6.1 of the regulation for the purposes of scanning. I am satisfied that, as explained by the board, scanning photocopies of severed records is necessary whether to provide them in paper form to the appellant or in order to provide the information on a CD-ROM.⁶ Accordingly, in all the circumstances, the board's photocopying fee estimate of \$632.80 is allowed.

ORDER:

I uphold the board's fee estimate and dismiss the appeal.

Original Signed By:
Steven Faughnan
Adjudicator

December 5, 2014

⁶ It should also be noted that for records provided on CD-ROMs, there may be an additional charge of \$10 for each CD-ROM.